No. 11635

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COAST VAN LINES, INC., a California corporation,

Appellant,

vs.

BERT ARMSTRONG, *et al.*,

Appellees.

PETITION FOR REHEARING.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

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To the Honorable United States Circuit Court of Appeals for the Ninth Circuit and the Judges Thereof:

Comes now Coast Van Lines, Inc., the appellant in the above-entitled cause, and presents this, its petition for a rehearing of said cause, and in support thereof respectfully shows:

Appellant feels most strongly that the Court has overlooked some compelling facts which require a reconsideration of the conclusion announced in this case.

I.

This Action Is Barred Under Both Section 9 and Section 11 of the Portal-to-Portal Act.

At the outset, it must be noted that this action was begun and tried before the Portal to Portal law was enacted. The amended complaint was filed March 23, 1946. [R. 6.] The judgment was entered December 3, 1946 [R. 28]; the Portal to Portal Act was approved May 14, 1947. (29 U. S. C. A. (Supp.) 260.)

Section 9 of the Portal to Portal Act provides as follows:

> "RELIANCE ON PAST ADMINISTRATIVE RULINGS, ETC.,—
>
> "In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval,

> interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect." (29 U. S. C. A. (Supp.) Section 258.)

This statute is thus made applicable to the present cause. This Court has denied appellant the benefit of this section, using the following language:

> "Appellant failed to plead good faith as a defense; we are therefore unable to consider it."

Inasmuch as the statute was passed and became a law while this case was on appeal, it was manifestly impossible for appellant to plead and prove good faith when no such requirement or defense was in existence. Moreover, the construction thus placed by the Court upon the Act will, if not modified, serve in many cases, as here, to make wholly ineffective the following provisions of Section 9 relating to actions brought *before* passage of the Act, to wit:

> "In any action or proceeding commenced *prior* to . . . this Act, no employer shall be subject to any liability or punishment for . . . failure . . . to pay minimum wages . . . if he pleads and proves that the act or omission complained of was in good faith," etc.

Since the Court has remanded the case to give appellant the benefit of the provisions of Section 11 of the Act, why should not appellant also have the same opportunity to defend under Section 9? Surely this must be what the Congress intended.

A sufficient showing of good faith was made by affidavit filed in this cause in this Court at the time of the oral argument. This is all that appellant could possibly do to defend under the provisions of Section 9. To deny appellant this opportunity is to deny it a right given by Section 9, which, on its face, applies to any action or proceeding commenced *prior to* or on or after the 14th day of May, 1947.

Appellant therefore respectfully urges that the order of remand in this case be modified to give a plenary new hearing and not merely a restricted one.

II.

The Judgment in This Case Is Not a Joint One but Is a Several and Separate Judgment for Each of the Successful Plaintiffs.

While the statute permits the cause of action of one plaintiff to be joined with a similar cause of action by another, nevertheless, it is the duty of the Court to weigh each cause of action separately and on its own facts. It is altogether probable that one could prevail and another fail. Section 16 of the Fair Labor Standards Act (29 U. S. C. A., Sec. 216) compels such treatment of the plaintiffs in this case and gives defendant the right to separate consideration of each claim. (See also *Virgil v. Cayuga Const. Corp.*, 55 N. Y. S. (2d) 94, affirmed 269 App. Div. 934.)

III.

Many of the Plaintiffs Are Certainly Affected by the Motor Carriers' Act (49 U. S. C. A., Sec. 304) and Section 13b of the Fair Labor Standards Act (29 U. S. C. A., Sec. 213).

We shall now consider the claims of many of the successful plaintiffs separately. Several of them engaged in work of such character that it cannot be doubted that a substantial portion thereof—far more than the 4%, held sufficient in *Morris v. McComb,* 92 L. Ed. 83—affected safety of operations and equipment within the meaning of the exemption claimed under 29 U. S. C. A., Section 213(b), and 49 U. S. C. A., Section 304.

We take, first, the case of David Garcia. [R. 218-220.] This plaintiff did nothing except drive a truck in transporting goods for Navy personnel principally, if not wholly, in interstate commerce. Those goods were shipped from out-of-state points to San Pedro for delivery to consignees and were transported by appellant to the homes of consignees to various points in California. The entire movement was continuously in interstate commerce. This plaintiff has been awarded a judgment in this case for $410.32. [R. 27.] Upon no theory can appellant be liable to him for one cent, since his employment for about seventy-three weeks consisted entirely of driving a truck in interstate commerce. Not only has he received a judgment against appellant for said sum, but the judgment for attorney's fees herein is based in part upon his recovery.

Plaintiff, George W. Peterson, has been given judgment against appellant for $303.88 [R. 20] for overtime of 313½ hours during a period of 57 weeks. [R. 25.] This plaintiff hired as packer, but was a driver. He testified that the goods hauled in the truck driven by him were "all for interstate" movements [R. 190] for Navy personnel. Thus, by his own testimony, without more, this plaintiff was engaged solely in driving trucks transporting goods in interstate commerce. Appellant is not, and cannot be, liable to him for one penny.

Plaintiff, Joseph Sevedra [R. 185], was a driver's helper for nine months. [R. 186, 188.] The goods handled by him were mostly those of Navy personnel [R. 186] and the record shows that most of said goods moved in interstate commerce. This plaintiff was given a judgment against appellant for $304.00 for overtime during a period of 55 weeks during the 1944-1945 period. It is unreasonable to say that this man was not engaged for a substantial part of his time in work affecting safety of operations and equipment under the Motor Carrier Act (49 U. S. C. A., Sec. 304). Therefore, appellant does not owe this plaintiff a cent.

Plaintiff, Louie Vaughn [R. 198-202], was given judgment for overtime for 957 hours [R. 22, 26] during a period of 174 weeks, in the amount of $951.78. [R. 28.] The record plainly shows that he was a full-time driver for 8 weeks, and thereafter was a driver from 10% to 15% of his time. He testified that about 19 out of 20 jobs were for Navy personnel [R. 200], and the record shows that the goods of such personnel moved principally in interstate commerce. The conclusion is inescapable that he was performing work involving safety of operations and equipment in the transportation of goods in

interstate commerce which, in percentage of his time, greatly exceeded the 4% held sufficient in *Morris v. McComb,* 92 L. Ed. 85, *supra.*

The plaintiff, Earl Graham, was given judgment for $322.04 [R. 28] for overtime of 5½ hours per week for 64 weeks. He drove "some of the time" [R. 175], and for three days a week for three months [R. 175] to and from Long Beach, hauling and handling goods of Navy personnel shipped to Great Lakes Naval Station, Washington, D. C., New York, South Carolina, Virginia, "in almost every state of the Union." [R. 177.] He says almost "100 per cent" of these goods were thus shipped [R. 177] out of Long Beach. This man, under his own testimany, is not entitled to a judgment against appellant.

Plaintiff, Sidney A. Smith, was hired as a packer, but was also a driver for about a year. [R. 269.] He testified that his driving was "that flat truck on the Navy (personnel) hauling from Long Beach, going from here to Long Beach all the time—hauling Navy freight." [R. 269.] By "Navy freight" he meant goods of Navy personnel, as the record shows that appellant handled no goods of the Navy itself. The year of driving mentioned is included in the total period convered by the judgment for overtime. This plaintiff is exempted, at least for the period of one year, from the Wage and Hour provisions of the Fair Labor Standards Act by reason of the provisions of 29 U. S. C. A., Section 213(b), and 49 U. S. C. A., Section 304, hence, not entitled to a judgment for said period.

Without detailing the activities of other drivers and helpers we have clearly shown in the briefs on file (Op. Br. 24-25; Rep. Br. 17-18) that: Emory Key was a

driver or driver's helper 10% of his time [R. 84]; Leon J. McRossen, 10% to 15% of his time [R. 204, 209]; Noble F. White, 15% of his time [R. 216, 217]; and Richard Magnus, 15% of his time [R. 230].

The facts shown respecting the work of the several plaintiffs who were drivers or driver's helpers, *supra,* when coupled with the finding of the trial court that 44⅔% of the entire business of appellant during the time involved herein was interstate, are sufficient, we submit, to show beyond reasonable doubt that each and every one of these drivers and driver's helpers was engaged in work involving safety of operations and equipment. We respectfully ask, how could it be possible, under this showing, to hold that none of these plaintiffs was engaged in work involving safety of operations and equipment, which is within the jurisdiction of the Interstate Commerce Commission, in view of the decision in *Morris v. McComb, supra,* where 4% is held to be substantial, and therefore sufficient to exempt them from the wage and hour provisions of the Fair Labor Standards Act?

The same argument applies, of course, to the plaintiffs who were loaders. Loading goods for transportation by truck in interstate commerce has been held to involve safety of operations and equipment. The Interstate Commission has so ruled, and its ruling has been fully sustained by the Courts. (See authorities cited in our Op. Br. pp. 19-23, including *Southern Gasoline v. Bayley,* 319 U. S. 44, 63 S. Ct. 917.) We urge for consideration by the Court the fact that 44⅔% of appellant's business

was in interstate commerce; that all drivers, driver's helpers and loaders handled and serviced the goods indiscriminately; and that it would be virtually impossible for any of these plaintiffs not to have been engaged in work involving safety of operations, both in time and activities, far in excess of the 4% held sufficient in *Morris v. McComb.*

Moreover, in its opinion this Court has made a holding, or finding, which fully supports our argument that the drivers, drivers' helpers and loaders above mentioned or referred to were engaged in work necessarily involving safety of operations within the meaning of the Motor Carrier Act (49 U. S. C. A., Section 304) and the Fair Labor Standards Act (29 U. S. C. A., Section 213(b)). This Court said, at page 2 of the opinion:

> "During the period in question approximately one-half of appellant's business consisted of the transportation of goods belonging to Navy personnel in accordance with a contract negotiated with the Navy Department."

We submit that, since "approximately one-half of appellant's business consisted of the transportation of goods belonging to Navy personnel," and since these goods moved mostly in the stream of interstate commerce, as shown by every witness in the case who testified in respect thereto; and since the trial court so found, safety of operations was necessarily involved. It would be impossible for it to be otherwise.

It must, therefore, be concluded that the judgment should be reversed as to the above named plaintiffs.

IV.

The Court Erroneously Concluded That Appellant Was Not a Retail Service Establishment Within the Meaning of Section 13(a)(2) of the Fair Labor Standards Act (29 U. S. C. A., Sec. 213 (a)(2)).

We earnestly insist that this Court has reached an erroneous conclusion in reference to the exemption claimed by appellant, that it is a retail service establishment the greater part of whose servicing was in intrastate commerce.

The Court appears to base this conclusion upon two assumptions, to wit: (1) That approximately 50% of appellant's servicing was wholesale, because done for Navy personnel under the so-called Navy contract; and (2) that appellant made a lower price or charge for such servicing than it made to individuals. Neither of these assumptions is correct, as we understand the facts shown by the record.

First, the 50% of appellant's servicing which is assumed to be wholesale, because performed under a contract with the Navy Department, was not in any sense wholesale. *This servicing was done for individuals, and upon the goods of individuals.* The Navy Department never had title to any of these goods, it was not in any sense a consumer of these goods and it had no property or monetary interest therein.

At most, the Navy Department acted merely as a fiscal agent for Navy personnel in making a contract for their benefit and in paying for the servicing done thereunder for the exclusive benefit of such personnel. All arrangements and contacts with respect to the goods serviced

were made with Navy personnel, or with members of their families, *and not with the Navy Department.* None of the servicing done under the contract involved goods or property of the Navy, or goods or property in which the Navy had any right, title or interest. The servicing thus done for Navy personnel, and upon property of Navy personnel, was as truly individual in character as if it had been done for John Jones and Bill Smith, individual members of the non-military public. Can it matter, in the slightest degree, that Navy personnel were represented by an agent in negotiating a contract for their sole benefit? We submit it is immaterial.

The ruling of the Wage and Hour Administrator that at least 75% of servicing shall be retail in character to entitle an establishment to the service exemption is not applicable under the facts of this case. Nor would it be controlling in law even if it were applicable. The Courts have not hesitated to declare such rulings beyond his power where they conflict with the intent and purpose of Congress, or where unreasonable, or arbitrary. In any event, the Administrator's ruling has no application to this case, since only individuals' goods were involved in appellant's servicing.

Second, the Court is in error in concluding that "The price paid was not the ordinary 'retail' price, but a special price based in reality upon the wholesale aspect of the business." We respectfully say that there is no factual support for this conclusion.

It is true that appellees state in their brief (page 11) that "These fees and prices were *different* from those charged to the individual customer." But appellees do not cite any part of the record to support the statement, nor could they do so. It is pure inference. We have

examined the record again and find nothing to justify appellees' quoted statement. The only portion of the record that even indirectly relates to this matter is found at pages 167-168, as follows:

> "Q. By Mr. Moore: Mr. Cummins, I ask you to examine the Defendant's Exhibit E, particularly of those portions concerning the tariffs involved, and ask you if those tariffs compare favorably with the tariffs charged for individuals for similar types of work?
>
> "Mr. Beardsley: That is objected to as not within the issues of the case and immaterial; and also, calling for a conclusion of the witness based upon matters not in evidence, what the tariffs are to the individuals, and not the best evidence of those tariffs.
>
> "The Court: What is the point, Mr. Moore, so I will be sure that I know?
>
> "Mr. Moore: Well, your Honor, I think it was raised by plaintiffs that, regardless of what work was done for the individual, whether it be for the Government or otherwise, that it constituted the bulk of lower priced rate, and that they felt that had some bearing on whether or not it was a service establishment or a service institution, by the price that was charged.
>
> "Mr. Beardsley: I have no such contention that the rates or prices charged had any bearing on that. I do not think I have made it.
>
> "The Court: I do not think it has any bearing at all and, on the statement of counsel now, I do not believe it is material.
>
> "Mr. Moore: That is the only purpose for which the question was asked and I will withdraw the question."

No inference can reasonably be drawn from this colloquy between Court and counsel that a lower, or even "a different," price was charged Navy personnel than was charged other individual members of the public. On the contrary, since the question giving rise to the colloquy was withdrawn the record is utterly silent on the point, and no inference at all can be drawn therefrom.

In connection with the service exemption claimed, the Court has cited *Lesser v. Sertner's, Inc.,* 166 F. (2d) 471, decided by the Circuit Court of Appeals for the Second Circuit, February 18, 1948. The Court there said, at page 473:

> "As we read the authorities, the test of whether the local merchant or purveyor of service is operating a retail establishment is the type of customers he has; *the volume of his business, the number of his employees or the manner in which trade is attracted and customers obtained is not material. If the customers are 'ultimate consumers' of the goods sold or serviced locally, the establishment is retail."*

The Court thus makes the ultimate test of whether an establishment is retail, in the sense of the statute, depend upon "the type of customers," and "if the customers are 'ultimate consumers' . . . the establishment is retail." The Court then cited *Roland v. Walling,* 326 U. S. 657, 666, and commented as follows:

> ". . . the purpose of the exemption was to make plain that when a local merchant sells to customers for their own consumption . . . the Act is not to be applied."

Can it be said that the Navy Department was the "consumer" of any of the goods serviced under the so-called

Navy contract? Certainly not. The "consumers" of those goods were their individual owners, that is, Navy personnel. The Navy Department had not the slightest interest therein. The Navy Department had nothing to be "serviced" under the contract.

We believe that, for the foregoing reasons, the Court has reached erroneous conclusions in respect to matters vital to a correct decision in this case, and that in the interest of justice a rehearing should be granted.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that the judgment of the District Court be upon further consideration reversed.

Respectfully submitted,

JOHN W. PRESTON,

PRENTISS MOORE,

Attorneys for Petitioner.

Certificate of Counsel.

I, John W. Preston, counsel for Petitioner, hereby certify that the above-entitled Petition for Rehearing is filed in good faith, that I believe the grounds thereof to be meritorious, and not for the purpose of delay.

JOHN W. PRESTON.